Nos. 96-843 & 96-847

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., ET AL,

and

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION, INC,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO. ET AL.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Federal Credit Unions ("NAFCU") is a non-profit association whose members comprise approximately 900 federal credit unions located throughout the United States. The members of NAFCU, and the more than 8.6 million member-owners of these credit unions, are adversely affected by the decision below. NAFCU submits this Brief to emphasize the critical significance of the decision of the court of appeals to the future of the credit union community and to present additional legal reasons why the Petitions should be granted. This Brief is filed with the consents of all parties to the captioned cases, which are on file with the Clerk.

NAFCU member credit unions serve 51.9% of all federal credit union members and have $ 105.6 billion in shares outstanding. NAFCU represents the interests of these credit unions and their members on issues pending in Congress, Executive agencies and the courts. A majority of the credit unions represented by NAFCU have been authorized to expand their field of membership pursuant to the multiple occupational group policy of the National Credit Union Administration ("NCUA") which is the focus of this litigation. These and other NAFCU members also might wish to apply for additional expansions based on this policy in the future. Further, the credit unions represented by NAFCU and their member-owners are adversely affected by the threat presented by the decision below to the public's confidence in the credit union system and the integrity of the National Credit Union Share Insurance Fund ("NCUSIF"), a fund created by Congress, financed by credit unions, and administered by NCUA to provide insurance for member accounts.

SUMMARY OF ARGUMENT

This case involves one of the most important issues ever litigated with respect to credit unions. Resolution of the meaning of the "common bond" provision of the Federal Credit Union Act (12 U.S.C. §1759) will have a profound effect on the future of the federal credit union sector of the financial services industry, which as of June 1996 had over $320 billion in assets.

1. The decision below conflicts with this Court's rulings on prudential standing and creates a square conflict with Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). The D.C. Circuit concluded that banks "were not intended beneficiaries of the FCUA. (Pet. App. 16a).[1/] Under this Court's prior decisions, the case should have been dismissed for lack of standing.

The D.C. Circuit, however, found prudential standing under an alternative standard of its own creation, the "suitable challenger" test. While ostensibly derived from this Court's "competitor standing" cases, the "suitable challenger" doctrine focuses exclusively on the effects of granting a party standing, rather than on the intent of Congress as required by this Court's decisions. Further, in determining whether the effects of granting standing to banks satisfied its "suitable challenger" doctrine, the court of appeals mischaracterized the statute in a manner that ignored the reasons why this case is distinguishable from this Court's competitor standing decisions.

1/ All Appendix citations refer to the Appendices in No. 96-843.

The "suitable challenger" doctrine is both contentless and subject to arbitrary application. Yet the D.C. Circuit has applied this doctrine in a variety of cases decided under the Administrative Procedure Act. This case presents an appropriate opportunity to resolve a recurring issue of great significance about the application of prudential standing principles by the Circuit with the largest administrative caseload.

2. The court of appeals erred by failing to defer to the NCUA's interpretation of an ambiguous provision of its authorizing statute, in violation of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The court also failed to consider the grant of authority in the first sentence of Section 1759, which is inconsistent with the "plain meaning" the court attributed to the "common bond" language in the exception clause attached to this provision. Taken as a whole, the text of Section 1759 supports NCUA's interpretation.

3. The D.C. Circuit's decision will have critical adverse effects on: (a) members of federal credit unions that have added multiple occupational groups to their field of membership under NCUA's policy, and underserved members of the public who will be denied access to financial services by that ruling; (b) credit unions that have added multiple occupational groups under that policy in the past or might wish to in the future; and (c) the National Credit Union Share Insurance Fund, which insures member shares in federal credit unions.

By limiting credit union membership to employees that share a single common bond, the decision below adversely affects the safety and soundness of many credit unions, by depriving them of the diversity in membership necessary to minimize risk and avoid the adverse effects of a downturn in a single underlying

company or industry. The decision also threatens to deprive credit unions, alone among all classes of federally insured financial institutions, of the ability to take advantage of the economies of scale that are essential to providing services to their members in a cost-effective manner. In addition, the threatened dismemberment of existing multiple employer credit unions creates a risk of capital losses that could ultimately result in increased outlays by the NCUSIF. By contrast, the NCUA's longstanding interpretation of the ambiguous language of Section 1759 furthers the goals of the statute by preventing these adverse effects.

I. THE STANDING DECISION DEPARTS FROM THIS COURT'S RULINGS AND CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT

The Court has stated repeatedly that in determining prudential standing, a reviewing court must examine Congress's intent in enacting the statute, in order to "determine whether [these plaintiffs] were meant to be within the zone of interests protected by those statutes." Air Courier Conference v. American Postal Workers Union, 498 U.S. 571, 524 (1991). A right to seek review is denied under the zone of interests tests "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." Clarke v. Securities Industries Ass'n, 479 U.S. 388, 399 (1987).

Here, the court of appeals agreed with the district court's conclusion that banks "were not intended beneficiaries of [the Federal Credit Union Act]." (Pet. App. 16a). It found that, in enacting the law, Congress was not "concerned about the competitive position of banks." (Pet. App. 22a).

> Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained. (Pet App. 21a).

These findings should have been the end of the inquiry and should have led to a determination that the banks lack standing under the zone of interests test.

The D.C. Circuit, however, did not dismiss but applied a second test of its own devise -- the "suitable challenger" doctrine -- to determine if banks nonetheless should be considered an appropriate litigant "to enforce a requirement designed to benefit the members -- particularly potential borrowers -- of credit unions." (Pet. App. 22a). Prior decisions of the court of appeals had construed this Court's competitor standing cases as permitting a party to be deemed within the zone of interests if its concerns are "sufficiently congruent with those of the intended beneficiaries of the statute" or show a "systematic alignment of interests with the statute's beneficiaries." (Pet App. 26a). Applying that rule to this case, the court concluded that the banks did have standing to enforce the common bond requirement, because:

> [t]here is . . . a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself represents a congressional judgment that the constraint on competition is the means to secure the

economic end. (Pet. App. 28a)(emphasis added).

The court's conclusion that the banks satisfy prudential standing requirements under the "suitable challenger" doctrine is erroneous for several reasons.

A. The "suitable challenger" test is essentially contentless. It simply provides a phrase for articulating a conclusion that a party should have prudential standing, rather than providing objective criteria that courts may use to make reasoned and consistent decisions as to whether a party should have standing. The lack of judicially manageable criteria is demonstrated by the D.C. Circuit's own application of the suitable challenger doctrine. In the first case in which it applied this doctrine, the court stated that to accept the characterization of a law as an "'entry-restricting' statute . . . as a basis for standing would eliminate the prudential standing requirement." Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 284 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Yet the court of appeals found prudential standing here on the precise basis that Section 1759 was an "entry-like restriction". (Pet. App. 28a).

B. The "suitable challenger" doctrine fundamentally transforms the nature of the zone of interests inquiry from a determination of Congressional intent into an examination of the practical effects of granting standing to a particular party. The doctrine is phrased in terms of whether a party's interests are "congruent with those of intended beneficiaries" (Pet. App. 21a, 23a), so that the resulting pattern of litigation is likely to resemble closely the litigation that presumably would have been filed by the entities Congress actually intended to protect. Under these circumstances, the D.C. Circuit finds prudential standing "even if

the plaintiff's interest is not precisely the one that Congress sought to protect". (Pet. App. 24a). However, this Court's cases provide no justification for a results-oriented test that bases a determination of prudential standing on the likely effects of giving a particular party an opportunity to litigate.

C. The "suitable challenger" doctrine is subject to arbitrary application, depending upon how the "interests" ostensibly involved are articulated. The competitor standing cases on which the court of appeals relied involved statutory lines of demarcation, which arguably prevented one type of company from offering a specific product to customers.[2/] The court of appeals mischaracterized Section 1759 as involving an entry restriction, when it actually operates in a fundamentally different fashion.

Section 1759 does not impose an "entry-like restriction." There is no dispute that each of the persons covered by a multiple employer group is already eligible to receive credit union services, either from an existing institution or from a credit union that could be newly organized. The only issue before NCUA is which credit union, out of the universe of those potentially eligible to serve those persons, ought to have the ability to attract them as members, factoring in safety and soundness considerations. This situation is thus fundamentally different from the competitor standing cases relied on by the court of appeals, in which a competitor patrolled

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2/ E.g., Clarke v. Securities Indus. Ass'n, supra (challenge to agency decision to permit banks to offer discount securities services to customers); Investment Co. Institute v. Camp, 401 U.S. 617 (1971)(may national banks offer collective investment services to their customers?); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970)(may national banks offer data processing services to their customers?).

an entry-restricting "picket line" -- that is, a statutory barrier that prevented any member of one class of financial institution from offering a specific service to customers.

This analysis of the court's "entry-restricting" rationale suggests two conclusions. First, the determination whether an entity is a "suitable challenger" is subject to materially different outcomes, depending upon how the reviewing court chooses to characterize the effects its lawsuit may have. Second, on its own reasoning here, the D.C. Circuit misunderstood the statutory scheme and mischaracterized the effects of allowing banks to litigate on behalf of the persons Congress actually intended to benefit -- existing and potential credit union members.

D. In sum, application of the fundamentally flawed "suitable challenger" doctrine has produced an anomalous result in this case. A statute intended to benefit workers, by facilitating their association in cooperative credit unions, has been invoked by financial institutions whose interests are inconsistent (indeed, hostile), with the result that workers' ability to associate freely and form safe and sound credit unions has been significantly restricted.

The D.C. Circuit has applied the "suitable challenger" doctrine to determine standing to challenge agency decisions under various federal statutes, notably the environmental laws. That court plays a leading role in determining federal administrative jurisprudence, and the principal cases in which this Court has applied the prudential zone of interests test involve claims under the Administrative Procedure Act. Clarke, 479 U.S. at 400 n.16. Accordingly, the recurring question of whether the "suitable challenger" test is consistent with this Court's prudential standing decisions would warrant review, even if it were not in conflict with the decision of another court of appeals.

In this case, Supreme Court review is especially appropriate because, as the Petitioners have demonstrated, there is an explicit conflict among the Circuits on the specific question whether banks satisfy the prudential standing requirement to challenge the NCUA's "common bond" provision. Branch Bank and Trust Co., 786 F.2d at 625-26.

II. THE COURT OF APPEALS MISAPPLIED CHEVRON AND MISINTERPRETED THE FEDERAL CREDIT UNION ACT

This case independently warrants review on the substantive question whether the D.C. Circuit misinterpreted Section 1759 and its common bond exception. Although there is no conflict among the Circuits on this issue, its significance for the future of the credit union industry warrants review at this time.[3/]

The court of appeals erred by failing to defer to the NCUA's longstanding construction of the meaning of the field of membership provision, as required by Chevron. The court found that the intent of Congress is clearly discernible from the statutory text and justified its contrary interpretation. (Pet. App. 6a). The court, however, did not find the meaning of Section 1759 in the language of the statute or the context in which it is used, but rather

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3/ See NationsBank of N.C., N.A. v. Variable Life Ins. Co., 115 S. Ct. 810, 813 (1995)(certiorari granted in the absence of a conflict, due to importance of the issue whether national banks may serve as agents in the sale of annuities). The "common bond" issue currently is pending decision before the Sixth Circuit, which previously decided that banks have prudential standing to sue. First City Bank v. NCUA, No. 95-6543 (argued October 15, 1996).

constructed its own interpretation from abstract logic. The court's reading does not take into account the full text of the statute and produces results fundamentally at odds with what Congress intended.

A. In concluding that the statute was unambiguous, the court relied heavily on the inclusion of the plural noun "groups" in the phrase "groups having a common bond" in the exception clause of Section 1759. The court found that this noun supported the conclusion that each and every member of the groups represented in a credit union must have the same, pre-existing common characteristic. (Pet. App. 6a-7a).

However, the court's selective use of a dictionary definition of "group" favorable to its interpretation, and disregard of a prior parallel definition that supports the NCUA's construction, shows the existence of an ambiguity which permits the agency to interpret the term in a manner consistent with either definition, and which requires the courts to defer to the agency's construction. National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992).[4/] The disagreement among the courts below about the proper interpretation of the term "groups" is itself prima facie evidence of an ambiguity in this statutory language. See Smiley v. Citibank (South Dakota) N.A., 116 S. Ct. 1730, 1732 (1996).

4/ The decision in MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994), is not applicable, because the dictionary definition that supports NCUA's conclusion is not an aberrant definition that contradicts the meaning "contained in virtually all other dictionaries." Id. at 2230.

B. On its face, the term "common bond" is inherently ambiguous. The phrase is not defined in the statute. Nor is it a term with a standard meaning in the financial services industry. Indeed, the court of appeals itself found that "[n]either syntactical argument" presented by the NCUA and by the banks "is convincing". (Pet. App. 6a). This finding, in itself, is persuasive evidence that there is an ambiguity in the statutory language.

C. In interpreting the "common bond" exception, the court failed to consider the principal clause of Section 1759 and to consider the language in this overall context. The first portion of that Section authorizes "incorporators and such other persons and incorporated and unincorporated organizations" to come together to form a federal credit union, subject to such rules as NCUA may prescribe.

Nothing in this language, authorizing previously-formed groups to coalesce together to form a credit union to promote thrift, suggests that Congress in 1934 intended to limit the right of free association and confine workers to engaging in cooperative self-help measures only with others employed by the same company or within the same industry. To the contrary, the full text supports NCUA's interpretation that various groups, each of which had previously organized along its own internal lines, could join together to establish a credit union.

The court also recognized but did not give effect to NCUA arguments that its longstanding interpretation was important to its ability to further its statutory obligations, namely to protect the safety and soundness of credit unions by permitting them "to realize economies of scale and to facilitate occupational diversification within the ranks of its membership." (Pet. App. 3a-4a). However, nothing in the language authorizing previously-

formed organizations to band together suggests that Congress intended to impose restrictions on the field of membership that would expose a credit union to a risk of failure, shared by no other type of federally insured financial institution, due to a mandatory intertwining of the health of the credit union and the business fortunes of a single employer or industry segment.

Congress also did not intend to deny most working Americans access to credit unions, or to condemn credit unions to a fate in which they are precluded from taking advantage of scale efficiencies, available to all other types of federally insured financial institutions, to offer cost-effective services to members. But as we demonstrate in the next Section, this is precisely the effect the court of appeals' decision will have.

In sum, there are substantial legal reasons to believe that the court of appeals' interpretation of Section 1759 is erroneous, based on consideration of the full text, and that it produces results opposite to those Congress intended in enacting this provision.

III. THE COURT OF APPEALS' DECISION WILL SUBSTANTIALLY HARM ALL FEDERAL CREDIT UNIONS AND THEIR MEMBERS

The decision of the court of appeals has severe and immediate detrimental effects on consumers and existing multiple occupational credit unions. These adverse effects are so profound as to adversely affect the safety and soundness of the entire credit union sector of the financial services industry.

A. Adverse Effects on Consumers.

Congress authorized creation of federal credit unions during the Depression, to provide less affluent Americans access to credit they either could not obtain or could not obtain at reasonable rates. (Pet. App. 16a-17a, 38a). Unable to obtain credit from banks, many working people were forced to turn to loan sharks or other institutions that charged excessive interest rates. Congress envisioned federal credit unions as a means of allowing persons unserved or poorly served by the banking system to associate together in self-governing organizations to engage in cooperative economic self-help efforts. (Id.).

Federal credit unions continue to play this vital role in today's economy. They offer consumers whose incomes span a broad spectrum access to credit and other financial services on reasonable terms. Further, many small businesses offer access to credit unions as a significant element in their employee benefits package. Workers with incomes too low to afford bank services thereby may obtain access to credit without having to resort to higher cost alternatives, such as finance companies, check cashing operations, and pawn brokers.

The court of appeals' decision may deprive millions of Americans access to affordable credit union services. Employees of small businesses will be especially harmed. Under the court's interpretation of the "common bond" requirement, many employers will be too small for their workers to support a viable credit union. NCUA has concluded that, for safety and soundness reasons, a federal credit union must have at least 500 potential members in order to be viable. (Pet. App. 4a). According to the Small Business Administration, however, in 1994 more than 62%

of all American jobs are provided by companies with fewer than 500 employees.

One of NCUA's principal purposes in adopting its multiple employer policy was to diversify risk; another was to allow groups of workers that were too small to support a viable credit union to band together to promote cooperative thrift. (Pet. at 6-7) In essence, the decision below denies the right of cooperative financial association to the vast proportion of working Americans, and to the very persons Congress found have the greatest need for access to credit union services.

Statistics submitted by NCUA to the district court suggest that in excess of 1100 people per day are now being denied access to membership in multi-employer credit unions affected by the court of appeals' decision. Further, if the district court orders dismemberment of these institutions into their constituent employee groups, millions of workers will have to withdraw their accounts and seek credit elsewhere. Thus, the decision threatens to return many low income workers to a status in which they are denied access to credit by the high fees and minimum balance requirements imposed by banks, and are forced to fall back on loan companies, loan sharks, pawn shops and check cashing stores that prey on underserved consumers.

B. Adverse Effects on Federal Credit Unions.

As NCUA demonstrates (Pet. 3, 15), the court of appeals' decision will have an adverse effect on approximately 3600 credit unions, which have relied on the multiple occupational group policy since 1982 to add some 158,000 employer groups to their membership. These institutions serve 32 million people, who hold $132 billion in shares and $94 billion in loans.

1. Financial Harm. Some of the adverse financial effects on members have already begun to occur. Multiple employer credit unions can no longer add new members from outside their core group to replace shareholders who die, retire or relocate. In addition, these credit unions made enormous investments of their members' money in the physical plant, computer systems and personnel necessary to service the new members added under the NCUA's policy. The NCUA estimates that over 200 multiple group credit unions will suffer financial losses within six months under the decision below. (Id.). Further, in a dismemberment scenario, these credit unions stand to lose a significant portion of their investments in personnel and capital assets. They also face the prospect of additional losses from the liquidation of substantial portions of their asset portfolios, which will be necessary to finance the share outflows.

The long-term effects of the court's decision may be equally devastating to the financial health of credit unions. As the court of appeals recognized (Pet. App. 4a), another explicit purpose of NCUA's adoption of the multiple employer policy was to permit "occupational diversification within the ranks of membership." During the recession of 1981-83, major industrial dislocations and plant closings occurred, especially in Midwestern States. Single employer credit unions were hit hard on both the share and loan sides of their balance sheets, because the financial circumstances of many members were adversely affected at the same moment due to a reversal in the fortunes of their common employer.

Diversification of risk is an elementary principle of financial management. NCUA responded to evidence of the financial risk inherent in single employer institutions by allowing credit unions to broaden and diversify their membership base, so

that they would not be dependent upon the fortunes of one employer or one industry. (Pet. at 6). The policy remains important today, in helping credit unions weather such events as corporate downsizings, restructuring of industries, and military base closings.

For example, if a credit union were restricted to the employees of one airline, the institution would face severe economic difficulties, through no fault of its own, if the airline were forced to close due to competitive losses. Similarly, if a company divided itself into parts, an employee credit union could suffer significant losses if forced to divide into component pieces, each of which would have to purchase separately assets formerly used by all members.

In sum, the court of appeals has reversed the longstanding NCUA-sanctioned movement toward diversification and in its place introduced a systemic risk into the federal credit union system. This risk is faced by no other type of federally insured financial institution. This result contradicts the Congressional intention to promote viable, cooperative financial institutions.

2. Commercial Harm. The decision below also will have significant adverse effects on the ability of credit unions to continue offering a broad range of cost-effective services to their members.

As the court of appeals recognized (Pet. App. 3a), the NCUA multiple group policy was intended to allow federal credit unions to "realize economies of scale." Experience has shown that substantial operating and financial efficiencies are available to insured financial institutions. Indeed, these scale economies are essential to allowing a credit union to offer services to members in a cost-effective manner. For example, the costs of originating and

servicing loans do not increase in proportion to the amount of the loans. Credit unions also are information intensive entities, in which the costs attributable to the generation, collection and management of information are high. There are significant scale economies associated with information handling -- that is, in computing and communicating.

By restricting occupational credit unions to a narrow field of membership, the court of appeals' decision threatens to deny these credit unions, alone out of all types of insured financial institutions, access to the scale efficiencies that are necessary to compete effectively in the market.

C. Adverse Effects on the Insurance Fund.

The ability of federal credit unions to diversify their membership and to take advantage of scale economies is critical to maintaining their safety and soundness. By restricting the field of membership, the court of appeals has adversely affected the financial strength of these institutions and increased the risk that some may fail in any economic downturn. The court thereby has increased the likelihood that demands will be placed on the federal insurance fund that insures deposits in credit unions, a burden that will be felt by the entire credit union industry.

Shares in federal credit unions are insured up to $100,000 by the National Credit Union Share Insurance Fund. 12 U.S.C. § 1783(a). Upon the insolvency of an insured credit union, the NCUA is authorized to liquidate its assets and draw upon the NCUSIF in amounts necessary to pay off all insured shares. 12 U.S.C. § 1787. The NCUSIF has not experienced a loss in nearly three years, because credit unions have been in good financial condition due to policies like the multiple employer rule, which

has allowed NCUA to create strong and diversely based credit unions.

By imposing additional risks on individual credit unions, the court's ruling increases the chances of a drain upon the NCUSIF, which is the ultimate support system for the credit union community. These risks include the heightened vulnerability from lack of diversity in membership; inability to enjoy scale economies and compete efficiently; and the prospect of capital losses from forced divestiture of physical plant and assets.

The risks of loss would be particularly great for small employee groups that would have to be spun off in dismantling multiple employer credit unions. Small groups may not be able to form a new credit union, consistent with NCUA safety and soundness guidelines, or to operate in a cost-effective manner. See Interpretive Ruling and Policy Statement 89-1, 54 Fed. Reg. 31165, 31171 (July 27, 1989). In such cases, the loans and assets of these groups would have to be sold. NAFCU's internal research concludes that 3000 existing multiple employer credit unions, representing 42% of all federal credit unions, may experience some level of loss upon dismemberment. There is a significant risk that some portion of these losses will have to be absorbed directly by the NCUSIF, to the detriment of all insured institutions.

CONCLUSION

For the reasons set forth above, the Petitions for a writ of certiorari should be granted.

Respectfully submitted

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